IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SANDRA LASSITER,

Plaintiff,

v. **Case No. 04-2213-JWL**

TOPEKA UNIFIED SCHOOL DISTRICT NO. 501, et al.,

Defendants.

MEMORANDUM AND ORDER

This lawsuit arises from events culminating in plaintiff Sandra Lassiter's departure from the employment of defendant Topeka Unified School District No. 501. On December 17, 2004, this court entered a memorandum and order granting defendants' motion to dismiss plaintiff's claims, but without prejudice to plaintiff filing an amended complaint on or before January 3, 2005. *See generally Lassiter v. Topeka Unified Sch. Dist. No. 501*, No. 04-2213-JWL, 2004 WL 2925899, at *1-*12 (D. Kan. Dec. 17, 2004). This matter comes before the court on defendants' motion to reconsider (doc. 94) the aspect of that order in which the court granted plaintiff leave to file an amended complaint. For the reasons explained below, defendants' motion to reconsider is summarily denied and plaintiff's deadline to file her amended complaint remains January 3, 2005.

Defendants seek reconsideration of the aspect of the court's order granting plaintiff leave to amend, which is a non-dispositive order. A motion seeking reconsideration of a non-

dispositive order "shall be based on (1) an intervening change in controlling law, (2) the availability of new evidence, or (3) the need to correct clear error or prevent manifest injustice." D. Kan. Rule 7.3(b). Reconsideration is also appropriate where a court "has obviously misapprehended a party's position on the facts or the law." *Hammond v. City of Junction City*, 168 F. Supp. 2d 1241, 1244 (D. Kan. 2001). Whether to grant or deny a motion to reconsider is committed to the district court's sound discretion. *Wright ex rel. Trust Co. v. Abbott Labs., Inc.*, 259 F.3d 1226, 1235 (10th Cir. 2001). In this case, defendants' motion is not predicated on an intervening change in controlling law or the availability of new evidence. Thus, the only colorable grounds for granting the motion would be the need to correct clear error or prevent manifest injustice or if the court misapprehended defendants' positions.

The court is entirely unpersuaded that it misapprehended defendants' positions or that it committed clear error by granting plaintiff leave to amend her complaint. Leave to amend is to "be freely given when justice so requires." Fed. R. Civ. P. 15(a). The court may justifiably refuse leave to amend on the grounds of undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, or futility of the proposed amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993). The decision whether to grant leave to amend is within the discretion of the district court. *Hayes v. Whitman*, 264 F.3d 1017, 1026 (10th Cir. 2001). In this case, for the reasons explained in the court's prior order, the court is simply unwilling to exercise its discretion to deny plaintiff an opportunity to amend her complaint when the

need to do so became apparent only after defendants delayed for months before challenging the sufficiency of the allegations in her complaint.

In support of their motion to reconsider, defendants argue that the timing of the motion to dismiss was dictated by the deadline that the court set in the scheduling order for plaintiff to amend her complaint, and apparently that they are entitled to victory now that plaintiff's deadline for amending her complaint has passed. As explained in the court's prior order, however, the timing of the motion was dictated by defendants' choice in litigation tactics, not by the court. Moreover, "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (quotation omitted); *see also, e.g., Rodi v. S. New England Sch. of Law*, 389 F.3d 5, 20 (1st Cir. 2004) ("The view that the pleading of cases is a game in which every miscue should be fatal is antithetic to the spirit of the federal rules."). Pleading is simply the starting point for focusing litigation on the merits and Rule 56 is the more appropriate procedure for the court to dispose of claims lacking merit. *Swierkiewicz*, 534 U.S. at 514.

Nevertheless, with that being said, defendants have certainly expressed valid concerns regarding discovery and the possibility that plaintiff may re-assert claims that are futile. The court is aware that the discovery deadline is fast approaching and a significant change in approach by plaintiff might create a legitimate need for defendants to conduct additional discovery. If so, the court would certainly be inclined to grant defendants additional time to

conduct the needed discovery. Defendants also point out that any amendment by plaintiff would be futile given the qualified immunity to which some of the defendants are entitled as well as the fact that she withdrew her request for a due process hearing. The court recognizes the possibility that these arguments might foreclose some of plaintiff's claims against some of the defendants if she does not refine her claims from those that she originally asserted. Nonetheless, the court need not resolve those issues until she files her amended complaint and defendants and the court can ascertain which claims she intends to pursue notwithstanding the court's prior ruling.

IT IS THEREFORE ORDERED BY THE COURT that defendant's motion to reconsider (doc. 94) is denied. Plaintiff's deadline to file her amended complaint remains **January 3, 2005**.

IT IS SO ORDERED this 30th day of December, 2004.

s/ John W. Lungstrum

John W. Lungstrum
United States District Judge